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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Appellant, v. JOHNNY ALEX NICHOLSON, Defendant and Respondent.	C084980 (Super. Ct. No. STKCRFE20160015859)

The People charged defendant Johnny Alex Nicholson with rape of a drugged victim (Pen. Code, § 261, subd. (a)(3); statutory section references that follow are to the Penal Code unless otherwise stated), assault to commit a specified sex offense during a first degree burglary (§ 220, subd. (b)), first degree burglary (§ 459), and grand theft (§ 487, subd. (a)). The magistrate held defendant to answer on all counts except the assault charge. The People filed an information and then an amended information, which charged defendant with rape of a drugged victim (count 1), rape of an unconscious victim

(§ 261, subd. (a)(4) (count 2)), assault to commit a specified sex offense during a first degree burglary (count 3), first degree burglary (count 4), grand theft (count 5), and misdemeanor sexual battery (§ 243.4, subd. (e)(1)) (count 6)).

Defendant moved to set aside the information as to every count except for the burglary count on the ground that the People did not present sufficient evidence to support a finding of probable cause. The trial court granted the motion.

The People appeal, contending the trial court erred in dismissing the sex crime charges for lack of corpus delicti. In the alternative, the People ask us to treat evidence of opportunity as sufficient to satisfy corpus delicti in cases involving sex crimes against unconscious victims. We reverse and remand for additional proceedings.

FACTS AND PROCEEDINGS

The facts that follow are taken from the preliminary hearing.

Around 1:00 a.m. on November 22, 2016, S.R. finished her shift as a dealer at a Stockton cardroom. She went to the cardroom's bar with a coworker and had five or six shots of cognac. At one point, she went out to the cardroom's front entrance, where she encountered defendant and a security guard. The guard thought S.R. was intoxicated.

Defendant was hanging around the cardroom even though the security guard repeatedly told him to leave because he was loitering. When defendant encountered S.R., he offered her a cigarette; she told him to leave.

Feeling the effects of the alcohol, S.R. went into the cardroom's bathroom and threw up. Some of the vomit got onto her pants, so she took them off. She then sat up and slept on the bathroom floor until around 4:00 a.m., when she decided to walk home even though she was still intoxicated.

S.R.'s apartment was about a block from the cardroom. She carried her pants as she walked home, covering herself with her long coat. The security guard asked her to wait as he had found her a ride, but she kept walking.

Defendant approached S.R. as she walked across the cardroom's parking lot. She did not know defendant. Defendant and S.R. spoke to each other for a minute or two as she crossed the parking lot. He offered to help, saying, "What are you doing? You're drunk." She declined the offer and told defendant she was going home.

S.R. walked faster and then began to run as she left the parking lot and reached the street. She eventually lost sight of defendant, but he was still following her when she reached her apartment. Defendant again said to her, "What are you doing? You're drunk."

By the time she got to her apartment, S.R. realized she did not have her keys. She decided to enter through the bedroom window that she had left open. Defendant offered to help, but she told him to go away. She removed the screen, opened the window, climbed in, and fell onto her bed that was under the window. S.R. pulled the blanket over herself and fell asleep.

S.R. awoke to find defendant standing in her bedroom closet. She was wearing the same clothes she had on when she passed out. She wet the bed out of fear when she saw defendant.

Defendant had ransacked S.R.'s apartment and barricaded the front door with a couch. She asked what he was doing and told defendant to get out of her home. Defendant got angry and repeatedly called her a "dumb bitch." Defendant said, "I raped you, you dumb bitch," and then said, "I could have fucked you, bitch." S.R. shouted for someone to call 911.

One of S.R.'s neighbors heard defendant say, "We had sex," and S.R. reply, "No, you raped me." Another neighbor heard her say, "Fuck you," to which defendant replied, "Well, I already did." Defendant fled from the apartment while carrying two bags. S.R. chased him and grabbed one of the bags, but defendant kept the other. Defendant told a third neighbor, "I fucked her."

S.R. was upset and appeared to be intoxicated when the police arrived. She could not recall any sexual contact from defendant, but there was a soreness on her inner thigh which she did not have the day before. If any sex had happened, she did not consent. S.R. went to the hospital for a rape examination, but the results were not entered into evidence.

Police found defendant around 9:00 a.m. He was lying on his back and had S.R.'s purse and a few bottles of alcohol; most of the clothes he was wearing belonged to S.R.'s brother. Defendant also appeared to be intoxicated. When given a *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) warning, he said he did not understand it. Defendant volunteered statements about the incident, telling the officers he thought S.R. needed help when he saw her walking home. Defendant said that "her drunk ass climbed through her own window" and admitted the purse belonged to S.R. He denied raping S.R., but said "he rubbed her pussy and titties."

The trial court granted defendant's motion to dismiss all of the counts other than the burglary charge, finding there was insufficient evidence that defendant took items worth more than $950 out of the apartment and, although it was a "close call," the corpus delicti rule was not satisfied regarding the four sex offense counts.

DISCUSSION

I

Corpus Delicti

The People contend the trial court erred in dismissing the four sex offense charges for lack of corpus delicti.

In a section 995 motion, the magistrate is the finder of fact. The superior court, sitting as a reviewing court, must draw every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. (*People v. Laiwa* (1983) 34 Cal.3d 711, 718.) On

appeal, "the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer." (*Ibid*.) We must draw, in favor of the information, every legitimate inference that may be drawn from the evidence. (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.)

"Evidence that will justify a prosecution need not be sufficient to support a conviction. . . . ' "Probable cause is shown if a [person] of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." ' . . . An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. . . ." (*Rideout v. Superior Court, supra*, 67 Cal.2d at p. 474, citations omitted.)

While defendant's admissions regarding sexually assaulting S.R. is evidence supporting all four sex offenses, it alone cannot provide sufficient proof to sustain the information.

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying exclusively upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.) "The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.]" (*Id*. at p. 1171.) Once this independent proof is submitted, the defendant's extrajudicial statements may be considered to strengthen the case. (*Ibid*.) The rule applies to preliminary hearings as well as to trials. (*People v. Herrera* (2006) 136 Cal.App.4th 1191, 1200-1201.)

The four crimes at issue here all require some form of unlawful sexual contact (§§ 261 ["Rape is an act of sexual intercourse"], (243.4, subd. (a) ["Any person who

touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery"]), or an assault with the intent to commit such an offense (§ 220, subd. (a) ["any person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289"]). The corpus delicti rule accordingly requires some evidence of harm that supports an inference of unlawful sexual contact or the intent to commit unlawful sexual contact.

The People assert sexual contact may be inferred from the soreness on S.R.'s inner thigh and defendant's opportunity to commit the crimes. The People assert defendant's intent to commit sex crimes can be inferred from the opportunity evidence, namely, defendant saw a drunk S.R. in front of the cardroom, he followed her home after she later left the cardroom in the middle of the night while visibly drunk, he entered her apartment after she passed out and spent hours therein, and he barricaded the apartment door. According to the People, the soreness on S.R.'s inner thigh is consistent with sexual contact like intercourse. We agree.

S.R.'s sore inner thigh supports an inference that defendant touched her there without her consent and with sufficient force to make it sore. Although, as defendant points out, there are more innocent inferences to draw from the sore thigh, that S.R. sustained this injury when climbing through her window and falling onto her bed or when she fell in the bathroom, the prosecution does not have to overcome other noncriminal inferences to establish corpus delicti. " '[T]he prosecution need not eliminate all inferences tending to show a noncriminal cause of [the harm]. Rather, the foundation may be laid by the introduction of evidence which creates a reasonable inference that the [harm] could have been caused by a criminal agency [citation], even in the presence of an equally plausible noncriminal explanation of the event.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 405 (*Ochoa*).)

The place where S.R. was touched, her inner thigh, supports an inference of unwanted sexual contact. Intentional touching of the inner thigh for the purpose of sexual arousal constitutes sexual assault (§ 11165.1, subd. (b)(4); *In re Mariah T.* (2008) 159 Cal.App.4th 428, 439). The fact that only S.R.'s inner thigh was sore supports an inference of sexual intent behind the touching. (See *In re Shannon T.* (2006) 144 Cal.App.4th 618, 622, [the location of the touch itself can support an inference that the defendant possessed the requisite specific intent].)

Defendant followed S.R. home late at night in spite of her rebuffs. He was in her apartment without her permission when the previously unconscious S.R. regained consciousness and awoke. Her sore inner thigh and his unwanted presence in her room watching her support an inference that he caused the soreness and that it was sexually motivated, and provides corpus delicti for the various charged sex offenses. While it may not be proof beyond a reasonable doubt of the charged crimes, that is not necessary. The corpus delicti rule does not require "impossible showings" from the prosecution. (*People v. Robbins* (1988) 45 Cal.3d 867, 886.) So long as the evidence establishes the trustworthiness of defendant's confession, it is satisfied. (*Ochoa*, *supra*, 19 Cal.4th at p. 406.) Such is the case here.

Since we find corpus delicti of the charged sex offenses, we decline to consider the People's invitation to adopt a different approach to the corpus delicti rule in sex offense cases.

DISPOSITION

The order granting defendant's section 995 motion is reversed and the matter is remanded for additional proceedings consistent with this opinion.

HULL, Acting P. J.

We concur:

MAURO, J.

RENNER, J.